No. 455

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

HENRY J. RIPPERGER, AS RECEIVER OF UNITED STATES ELECTRIC POWER CORPORATION, PLAINTIFF-APPELLANT,

v.

A. C. ALLYN & CO. INC., AND FIRST BOSTON CORPORATION, DEFENDANTS-APPELLEES,

AND

SCHRODER-ROCKEFELLER CO. INC., DEFENDANT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Henry J. Ripperger, as Receiver of United States Electric Power Corporation, respectfully prays that a writ of certiorari issue to review the decree (R. ~~40~~ 38) of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on August 1st, 1940 affirming the orders (R. 5-10) of the United States District Court for the Southern District of New

York made and entered the 9th day of May, 1940 vacating and setting aside the attempted service of the summons and complaint in the above cause on the defendants A. C. Allyn & Co. Inc. and First Boston Corporation and dismissing the complaint as to said defendants.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 35) is reported in 113 F. (2d) 332. The opinion of the United States District Court for the Southern District of New York is not reported but is printed in the Record (R. 28).

Jurisdiction.

The decision of the Circuit Court of Appeals for the Second Circuit was rendered on July 15, 1940 and the order for mandate (R. ~~40~~ 38) was dated and issued on August 1, 1940 and entered on August 2, 1940. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., Section 347[a]).

Question Presented.

The question presented by this appeal is whether a prior dismissal of an action brought against the respondents herein in the District Court for the Southern District of New York for lack of jurisdiction due to improper venue is *res judicata* and available as a bar to the instant action.

Statement.

Petitioner, as Receiver of United States Electric Power Corporation, on May 2, 1938, instituted an action in the United States District Court for the Southern District of New York against various directors, organizers and stockholders of the corporation and certain other persons. Among the defendants named in that action were A. C. Allyn & Co. Inc., a Maryland corporation, and First Boston Corporation, a Massachusetts corporation and these corporations were duly served with subpoenas and copies of the bill of complaint. (R. 1-2) Subsequently, A. C. Allyn & Co. Inc. and First Boston Corporation moved for orders vacating and setting aside the attempted service of subpoenas and complaints upon them on the ground that the jurisdictional basis of the suit was alleged to be diversity of citizenship and that neither plaintiff nor either of said defendants were inhabitants or residents of the State of New York or of the Southern District of New York. Both motions were unopposed and orders were entered on June 8th and June 13th, 1938 vacating the service of the subpoenas and complaints and dismissing the complaints as to the defendants A. C. Allyn & Co. Inc. and First Boston Corporation respectively. No appeal was taken by the petitioner from said orders. (R. 2, 3)

Petitioner thereupon instituted separate actions against A. C. Allyn & Co. Inc. and First Boston Corporation in the United States District Courts of Delaware and Massachusetts respectively, which actions were based upon the same transactions complained of in the original action instituted in the United States District Court for the Southern District of New York. (R. 3)

Subsequently, this Court in the case of *Neirbo* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, in reversing a decision of the United States Circuit Court of Appeals

for the Second Circuit, held that where a foreign corporation does business in the State and designates an agent for the receipt of process, it consents to being sued in the Federal Courts of that State. (R. 3) Petitioner thereupon instituted the instant action against A. C. Allyn & Co. Inc. and First Boston Corporation in the United States District Court for the Southern District of New York alleging the appointment of agents by said defendants within the State of New York for the receipt of process. In all other respects the complaint in the instant action is similar to the complaint in the original action instituted on May 2, 1938, which is presently pending, as against those defendants who have answered, in the United States District Court for the Southern District of New York and is awaiting trial. (R. 3)

The purpose of petitioner in instituting the present action in the United States District Court for the Southern District of New York was to obtain a consolidation or a joint trial of the instant action with the original action in which twenty-five defendants have appeared and answered and thus dispose of the entire cause in one trial rather than in three.

First Boston Corporation and A. C. Allyn & Co. Inc., by notices of motion dated April 9th and April 5th respectively, moved for orders vacating the attempted service of the summons and complaint and dismissing the complaint as to each of them upon the ground that the prior dismissals as to them in the original action were *res judicata* of the question of venue. (R. 3, 4) These motions were granted by orders of the United States District Court for the Southern District of New York dated May 9, 1940. (R. 5-10) Petitioner thereafter appealed from both orders to the Circuit Court of Appeals for the Second Circuit by notices of appeal dated May 27, 1940. (R. 25-27) On July 15, 1940 the orders of the District Court were affirmed by the Circuit Court and decrees were entered thereon.

Specification of Error to be Urged.

That the Circuit Court of Appeals erred in holding that the prior dismissals on the ground of improper venue in the original action required a dismissal of the present action as to First Boston Corporation and A. C. Allyn & Co. Inc. upon principles of *res judicata.*

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with a decision of the Circuit Court of Appeals for the First Circuit on the same matter.

2. The decision of the Circuit Court of Appeals herein is not in harmony with the applicable rule as laid down by this Court and the lower Federal and State Courts.

3. The application of the principle of res judicata to the instant case defeats the purpose of that rule and creates uncertainty in a field of general law of great importance.

1. The opinion of the Circuit Court of Appeals for the Second Circuit recognizes that its holding is in conflict with the only other decision in which the precise issue was raised, (R. 38) the holding of the Circuit Court of Appeals for the First Circuit in *Rand* v. *United States* (C. C. A. 1) 53 F. 348 affirming (D. C. Me.) 48 F. 357. There, as in the instant case, a prior action brought by the plaintiff in the same Court had been dismissed on jurisdictional grounds. Subsequently, the decision of the Circuit Court, on which the District Court had based its prior dismissal, was reversed. Plaintiff instituted a second suit which was sustained on the ground that the prior dismissal for supposed lack of jurisdiction was not a bar to the second suit.

2. The exact issue presented by the instant appeal has not been passed upon by this Court nor have the opinions of either the Circuit Court or District Court below,

nor research by any of the parties to this appeal disclosed any decision in any of the Federal Courts, other than *Rand* v. *United States, supra,* dealing with the precise situation. To that extent this appeal presents a question of first impression to this Court.

But the general rule applicable to the instant case is well-established and has never heretofore been questioned. This Court has held that a prior dismissal for want of jurisdiction cannot be pleaded in bar of a subsequent suit (see *Hughes* v. *United States,* 71 U. S. 232) even though the second suit be brought in the same court (*Smith* v. *McNeal,* 109 U. S. 426). The lower Federal and State Courts are in accord. *Mack* v. *United States,* 29 F. Supp. 65, 67.

The Circuit Court below makes a factual distinction of these cases but fails to explain why their reasoning and purpose is not applicable to the instant case. Instead, several recent decisions of this Court* (R. 3[illegible]) are cited for the proposition that "the principles of *res judicata* apply to questions of jurisdiction as well as to other issues."

Each of these cases hold that when a Court in passing upon the issue of jurisdiction resolves it *in favor* of a consideration of the merits of the cause which it then determines, such a judgment subsequently cannot be attacked on the ground that the Court in fact lacked jurisdiction. These cases involve questions entirely foreign to the one presented in the instant appeal. They represent rather a departure by this Court from the early rule that a judgment rendered without jurisdiction is null and void and may be collaterally attacked. They are no authority and, it is submitted, were never intended to be authority for the proposition for which it is sought to employ them—that a *dismissal* of an action for lack of jurisdiction will be *res judicata* and will bar a subsequent suit.

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* *United States* v. *Moser,* 266 U. S. 236; *Baldwin* v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522; *American Surety Co.* v. *Baldwin,* 287 U. S. 156; *Chicot County Dist.* v. *Baxter State Bank,* 308 U. S. 371; *Sunshine Anthracite Coal Co.* v. *Adkins,* 60 S. Ct. 907.

3. The real question presented by this appeal is whether the principle of *res judicata* is to be employed as a means of prolonging and duplicating litigation instead of quieting and terminating it. The effect of the holding of the Circuit Court is not to put an end to this litigation, which involves more than twenty-five defendants, but to compel the petitioner to pursue his remedy in three different forums instead of trying the whole cause in the District Court for the Southern District of New York. The application of the principle of *res judicata* to the instant cause results in a perversion of its long-established and oft-repeated purpose, an application which no other court has ever permitted.

In the cases relied upon by the Court below the effect of the decisions was to further the purpose of the principle of *res judicata*, to put an end to litigation once the court has passed upon the merits of the controversy between the parties. No such purpose is served by the holding of the Circuit Court in the instant cause. The holding in no sense puts an end to the litigation and under the circumstances here present, increases the number of trials from one to three.

Ordinarily, where a suit is dismissed on the ground of improper venue, a plaintiff will seek another forum for his second action, not because the prior dismissal is *res judicata* in the first forum, but for the practical reason that, based on the rule of *stare decisis*, the court in the first forum will again decline jurisdiction unless plaintiff can point to a different reason why the court should entertain jurisdiction. But the second suit should be sustained, though in the same court, if new jurisdictional facts are alleged, as in *Smith* v. *McNeal, supra*, or if the prior dismissal was erroneous as subsequently demonstrated by the holding of or reversal by a higher court, as in *Rand* v. *United States, supra*, or if the statute upon which jurisdiction depends was changed, as in *Cahill* v. *Wissner*, 183 App. Div. 659, affirming 102 Misc. 313.

Conclusion.

It is submitted that this appeal presents this Court with the opportunity of clarifying any ambiguity or uncertainty which its recent decisions denying the right of collateral atack on judgments on jurisdictional grounds may have cast upon the well-established rule that dismissals for want of jurisdiction are not *res judicata* and do not bar a subsequent action. The decision of the Circuit Court below stands alone for the proposition it propounds and is in direct conflict with the holding of the Circuit Court of Appeals for the First Circuit in *Rand* v. *United States, supra.* It contraverts a rule which has long been adhered to by this Court and by the lower Federal and State Courts. It is an application of the principle of *res judicata* which defeats and denies its very purpose.

WHEREFORE, it is respectfully prayed that this petition for writ of certiorari be granted to review the decree of the Circuit Court of Appeals for the Second Circuit confirming the orders of the United States District Court for the Southern District of New York vacating the summons and complaint and dismissing the complaint as to defendants First Boston Corporation and A. C. Allyn & Co. Inc. in the instant action.

Respectfully submitted,

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PERCIVAL E. JACKSON,
Counsel for Henry J. Ripperger, Petitioner.

September, 1940.